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No. 342

In the Supreme Court of the United States

OCTOBER TERM, 1933

STATE OF FLORIDA ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ATLANTIC COAST LINE RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

FEBRUARY 1934.

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OPINIONS

The opinion of the specially-constituted District Court (R. 610), *State of Florida et al.* v. *United States et al.*, is reported at 4 F.Supp. 477. The reports of the Commission, (R. 27 and 361) entitled No. 18364, *Georgia Public Service Com.* v. *Atlantic Coast Line Railroad Company*, are published at 186 I.C.C. 157 and 190 I.C.C. 588.

Opinions relating to the validity of the Commission's first order in this proceeding, dated August

2, 1928, are *Florida* v. *United States*, 282 U.S. 194, 30 Fed. (2d) 116, 31 Fed. (2d) 580. The Commission's original report, also dated August 2, 1928, is published at 146 I.C.C. 717.

JURISDICTION

Appellants duly submitted their Rule 12 statement as to jurisdiction. Appellee Atlantic Coast Line Railroad Company thereafter submitted a statement opposing jurisdiction and a motion to dismiss the appeal or to affirm the decree of the court below. August 14, 1933, appellants filed a brief opposing the motion. October 9, 1933, this Court found probable jurisdiction and ordered that further consideration of the motion be postponed to the hearing on the merits.

QUESTIONS PRESENTED

After the decision of this Court in *Florida* v. *United States*, 282 U.S. 194, holding invalid the order of the Interstate Commerce Commission of August 2, 1928, insofar as it required increases in the Florida intrastate rates, on the ground that this part of the order was not supported by proper findings, the Commission reopened the case, held further hearings, and issued a new report and order, dated July 5, 1932. (R. 78–79.)

The main question presented is whether this order, directed solely against the Atlantic Coast Line Railroad Company, and requiring increases in the intrastate rates in question to the level of the

reasonable interstate rates, in order to remove unjust discrimination against interstate commerce resulting from the fact that the intrastate rates were so low that they cast an undue burden upon the revenues of the interstate carrier, was a valid exercise of the authority conferred upon the Commission by Section 13 (3) and (4) of the Interstate Commerce Act.

The principal subordinate questions are:

Whether the amendment of section 15a of the Interstate Commerce Act, made by Emergency Railroad Transportation Act, 1933, approved June 16, 1933, subsequently to the issuance of this order, has stricken down the Commission's power under section 13 (3) and (4) to remove unjust discrimination as against interstate commerce because of an undue burden upon the revenues of an interstate carrier resulting from unduly low intrastate rates.

Whether the Commission's order is adequately supported by findings, especially those relating to the past and present effect upon the revenues of the carrier resulting from the intrastate rates in question.

Whether, in view of the fact of temporary, experimental reductions in certain log rates elsewhere than in the Florida peninsula, by a number of southern carriers other than the Atlantic Coast Line, down to a basis as low as the Atlantic Coast Line's Florida intrastate (Cummer scale) rates in

question, in an effort to meet truck competition, it was beyond the Commission's power to order increases in the Coast Line's Cummer scale in Florida to a reasonable, nondiscriminatory level, notwithstanding the findings that the Cummer scale rates were noncompensatory, unremunerative, and below the cost of the service, and that their continued maintenance to meet what little truck competition could be met would greatly decrease the Coast Line's revenues and would not be warranted.

Whether the court below erred in denying a trial *de novo* to determine independently whether the intrastate rates in fact caused unjust discrimination against interstate commerce.

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the Appendix.

STATEMENT

This is an appeal from a final decree of the court below refusing prayers in three bills to annul, set aside and enjoin the order entered July 5, 1932, by the Commission in a proceeding entitled No. 18364, *Georgia Public Service Commission* v. *Atlantic Coast Line Railroad Company*.

The proceeding was begun by complaint filed May 3, 1926, by the Georgia Public Service Commission, alleging that the Atlantic Coast Line's interstate log rates from Florida to Georgia were unreasonable and discriminatory, in violation of

sections 1, 2, and 3, and that its intrastate log rates in Florida were unduly preferential of intrastate shippers in Florida, unduly prejudicial to interstate shippers from Florida to Georgia, and unjustly discriminatory against interstate commerce, in violation of section 13 (3) and (4), of the Interstate Commerce Act.

The alleged violations of section 13 grew out of the maintenance by the Coast Line of a very low scale of intrastate log rates in Florida, known as the Cummer scale. This scale originated in a contract entered into many years ago between a railroad, later acquired by the Coast Line, and the Cummer Lumber Company, when both the railroad and the lumber company were controlled by the same interests. At first the scale applied only between the points specified in the contract and only upon trainload shipments of logs. Later it was made to apply on single carloads and between any two points on the Coast Line in Florida for distances of 170 miles and less. (Report, R. 32; see Appendix A of report, R. 68–71.) The Coast Line was the only railroad in Florida that maintained this low scale and even on that line the scale was inapplicable for distances greater than 170 miles. Beyond that distance its Florida intrastate log rates were on a much higher basis and were not alleged to be violative of section 13.

In its original report and order, dated August 2, 1928, 146 I.C.C. 717, the Commission found that

the interstate rates from northern Florida to Georgia for distances of 170 miles and less were unreasonable, and, in lieu thereof, prescribed and ordered slightly lower rates which it found to be reasonable. The Commission also found that the Cummer scale rates, which were approximately 50 percent lower than the rates found reasonable for interstate application for the same distances, resulted in undue preference of intrastate log shippers in Florida, in undue prejudice to interstate shippers of logs from Florida to Georgia, and in unjust discrimination against interstate commerce. The order required the removal of the undue preference, prejudice, and discrimination by increasing the Cummer scale rates throughout Florida to the level of the rates found reasonable for similar distances in interstate commerce.

In suits to enjoin the order to increase the intrastate rates the District Court sustained its validity, and the prescribed intrastate rates, as well as the prescribed interstate rates, were put into effect February 8, 1929. Upon appeal to this Court it was held that the order was not sustainable on the ground of undue prejudice against persons and localities in interstate commerce, because the evidence did not show such prejudice at all points on the Coast Line in Florida, nor could the order be sustained on the ground of unjust discrimination against interstate commerce caused by revenue losses from the intrastate rates because the Com-

mission failed to make findings respecting the past and future revenue effect of the existing and prescribed intrastate rates. The opinion rendered by the Chief Justice concluded "that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside. *Florida* v. *United States*, 282 U.S. 194, decided January 5, 1931. In so concluding, however, the Court stated, page 215, that

> If the facts as to the intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require.

After the mandate of this Court and the issuance of the injunction, the Atlantic Coast Line was compelled by the Florida Commission to restore the Cummer scale (R. 1081, 1091), and that scale again became effective April 10, 1931. (R. 32.) The *interstate* rates prescribed in the order were not disturbed and those rates are still in effect, not only from northern Florida to Georgia but elsewhere on the system of the Atlantic Coast Line, as explained more fully hereinafter.

Shortly after the decision of this Court, the complainant and defendant in the Commission proceeding petitioned the Commission to reopen the case. (R. 1078, 1084.) These petitions were granted. (R. 1098.) After a further hearing, briefs, proposed report, exceptions, and oral argument, the Commission on July 5, 1932, issued its Report on Further Hearing, 186 I.C.C. 157 (R. 27–78), reviewing the evidence fully and stating its findings and conclusions.

As stated in the report, the principal issue upon rehearing was whether the Cummer scale caused unjust discrimination against interstate commerce (R. 32) and it is evident from the report as a whole that the unjust discrimination referred to was that growing out of revenue losses to the carrier from the maintenance of the low Cummer scale rates. As also stated in the report, "Upon rehearing, the Atlantic Coast Line though nominally the defendant was in the position of a petitioner under section 13 (3) and (4) of the Act seeking relief from what it contends are unduly low State rates." (R. 30.)

Summary of findings on rehearing

Based upon voluminous evidence comparing the Cummer scale rates with other rates on logs in the South and elsewhere, and with the rates on other low-grade commodities, many of which rates had been prescribed by the Commission as reasonable, with a showing of the revenues on both the per-car

and ton-mile bases, the Commission concluded and found that the Cummer scale rates were abnormally low, and affirmed the former finding that they were less than reasonably compensatory. (R. 27.) The Commission further found, from a mass of cost evidence, reviewed in considerable detail in the report (R. 51 to 61), that the Coast Line's revenue under the Cummer scale, amounting only to $15.12 per car, for transporting a carload of logs weighing 56,751 pounds for a distance of 81 miles, and transporting the empty car back, was "insufficient under all the circumstances and conditions to cover the full cost of the service." (R. 61.) It further found that the interstate rates which it had prescribed in the original report, which were and still are in effect, are reasonable rates (R. 66); that "transportation conditions in Florida are not such as to warrant a lower basis of rates on logs in that State than elsewhere on defendant's system," transportation conditions there being not more favorable but on the contrary "less favorable than on defendant's system outside of Florida." (R. 35–36, 66.) In considering the question of the relation of the Cummer scale rates to the defendant's income, the Commission observed that the rate of return on the defendant's investment in road and equipment declined from 6.50 percent in 1926 to 4.55 percent in 1929, and to 2.54 percent in 1930.[1]

[1] Later figures, given in *A. C. L. R. Co.* v. *Cape Fear Ry.*, 197 I.C.C. 397, decided November 14, 1933, are as follows: 1.57 percent in 1931, and .04 percent in 1932.

(R. 38) The Commission further found that the defendant's Florida log traffic is an important one, constituting 50 percent of its total log traffic, which in turn constitutes 7 percent of its entire traffic, and that the revenue from the Florida log traffic, therefore, has a substantial influence upon the defendant's total revenues (R. 38–39); that during the period from February 8, 1929, to January 31, 1931, when the increased intrastate log rates prescribed by the former order were in effect, and when depressed conditions prevailed, a total movement of 18,602 carloads of logs were transported under those rates, (R. 40, 44, 65) on which gross freight revenues of $571,508.94 were collected, whereas if the Cummer scale had applied this movement would have produced gross freight revenues of only $281,225.75, or $290,283.19 less than those actually collected (R. 40, 65); that vast stands of virgin timber remain in Florida (R. 46), much of which is tributary to the lines of the A. C. L. (R. 47), and that the record as a whole warranted the conclusion that there will be a large Florida intrastate movement of logs over defendant's lines in the future (R. 50); that the traffic moving at the Cummer scale rates does not pay its fair proportionate share of operation and maintenance alone (R. 64); that under normal economic conditions the volume of the Florida log movement in the future under the increased intrastate rates prescribed will probably average not less than 7,431 cars a year (R. 65);

that the continuance of the Cummer scale rates upon this volume of traffic, conservatively estimated as the minimum future volume, would cause the carrier a loss in revenue of at least $100,000 annually (R. 66); that the application of the Cummer scale placed a substantial burden upon the carrier's interstate revenues, (R. 66) and that, therefore, those rates "are, and for the future will be, unjustly discriminatory against interstate commerce" because unduly burdening the revenues of the carrier (R. 66), and that such discrimination could and should be removed by the establishment intrastate in Florida of the same rates as had been found reasonable for interstate application. (R. 66.)

In view of the above findings, the Commission deemed it unnecessary to make a finding in reference to undue prejudice against persons and localities in interstate commerce. Its report states that as a result of the earlier order the rates from northern Florida to Georgia were reduced and the rates within Florida were increased and both were on the same level from February 8, 1929, to April 10, 1931, but that notwithstanding this parity of rates, it appeared that there was no movement of logs from Florida to Georgia during that period, except possibly an occasional carload, and that whether an interstate movement from Florida to Georgia would develop after the interstate and intrastate rates

were again put on a parity and the rates situation finally settled, and it was then impossible to say. (R. 67.)

"Inasmuch as we find," the Commission said, "that the Cummer scale rates cause unjust discrimination against interstate commerce from a revenue standpoint and our order herein removes that discrimination by increasing those rates on defendant's lines throughout the State of Florida to the level of the interstate rates previously prescribed and now in effect, no finding in reference to undue prejudice against persons and localities in interstate commerce is necessary and we make no finding in that regard. Any such undue prejudice as now exists because of the disparity in the intrastate and interstate rates will be removed by compliance with the order which we here enter for the purpose of removing the unjust discrimination against interstate commerce." (R. 67.)

The order in question

The order of July 5, 1932, (R. 78–79) requires the Atlantic Coast Line to "cease and desist from practicing the unjust discrimination found in said report to exist in the relation of intrastate and interstate rates and to establish, put in force, and maintain rates for the transportation of logs over six feet in length[2] except walnut, cherry, and

[2] Logs shorter than 6 feet are known as "short logs" or "blocks" and take different rates. See Report, R. 34.

cedar,[3] in carloads, minimum weight 40,000 pounds, in intrastate commerce within and throughout the State of Florida for distances of 170 miles or less, which shall be the same as those set forth in Appendix F [R. 78] to the aforesaid report on further hearing."[4]

The order in question, being directed solely against the Atlantic Coast Line, and the intrastate rates prescribed being only for distances of 170 miles and less, the effect of its requirement is that the Atlantic Coast Line shall apply the prescribed intrastate rates upon shipments of logs between any two stations on its lines in Florida where the distance is not greater than 170 miles.

The requirement is made against the Coast Line only because it is the only railroad serving Florida which maintained an unduly low scale of intrastate rates. (R. 32, 612.). The Florida intrastate log rates of other railroads did not approach the low level of the Coast Line's Cummer scale. (R. 34.)

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[3] Walnut, cherry, and cedar logs, on account of their greater value, usually take higher rates than other kinds of logs. There appears to be no movement of walnut or cherry logs in Florida; hence this exception in the order is not important so far as such logs are concerned. (See Report, R. 47, note.) The Cummer scale did not apply on cedar logs.

[4] The Cummer scale is shown in Column 1 of Appendix B of report, R. 72A. The prescribed intrastate rates, which supplant the Cummer scale, are the same as those prescribed in the earlier order and are shown in Column 5 of that appendix for distances up to and including 170 miles. See text of report, R. 33.

Their log rates for all distances in Florida were either the Florida Commission Class P rates or rates that were only slightly lower, and they were not alleged or found to be unduly low, or discriminatory against interstate shippers or commerce.

The requirement of the order is limited to rates for distances of 170 miles and less because the Commission found that the Florida Commission Class P rates maintained by the Coast Line for distances greater than 170 miles "were only slightly less than the then prevailing interstate log rates for the same distances." (Report, R. 32.) Thus there was no substantial disparity as between interstate rates and Florida intrastate rates on logs for distances greater than 170 miles, not even on the Coast Line. The discrimination alleged and found grew out of the existence of the Coast Line's Cummer sale, and that only.

Proceedings in Court below on bills to enjoin order of July 5, 1932

Bills were filed in the District Court for the Northern District of Georgia (R. 1, 419 and 527) to set aside and enjoin the Commission's order of July 5, 1932. Hearing was had before the District Court of three judges on September 14, 1932, and the Court issued a temporary stay of the operation of the Commission's order for a period not exceeding 60 days. (R. 333.)

Second rehearing before Commission

Before a decision on the merits was rendered by the District Court, the appellants (petitioners below, who had actively participated in the Commission proceeding as interveners) petitioned the Commission for another hearing (R. 362), on the ground that a number of southern railroads had established reduced per-car rates on logs which were almost as low as the per-car charges under Cummer scale rates applicable on the Atlantic Coast Line in Florida. The Commission granted the petition for rehearing, at the same time suspending the operation of the order of July 5, 1932. (R. 362–363.) Further hearing was held in November, 1932, and considerable additional testimony was taken. (R. 917–1077.) On January 9, 1933, the Commission issued a report upon the rehearing, 190 I.C.C. 588, (R. 361–376) in which it found that the low per-car rates on logs had been voluntarily established by certain carriers in the south, other than the Atlantic Coast Line, primarily as an experiment to meet truck competition, whereas in Florida truck competition existed only for very short distances of 25 miles and less in the movement to small mills; that the establishment of truck-competitive rates by the Atlantic Coast Line in Florida for distances under 25 miles would regain little, if any, traffic, and that "to require defendant to continue to maintain the Cummer scale to meet what little truck

competition could be met would greatly decrease the revenues of defendant and would not be warranted." (Report, R. 375.) The Commission affirmed all the findings it had made in its report of July 5, 1932, and restored its order of that date, effective February 25, 1933. (R. 375, 376, and 377.)

Saving clause.—In its second report on rehearing, the Commission incorporated a saving clause, such as approved by this Court in the *Wisconsin case*, 257 U.S., 591, and other cases, reading as follows:

> Our findings herein and in our prior report on further hearing are without prejudice to the right of the authorities of the State of Florida or of any other interested party to apply in the proper manner for a modification of our findings and order as to any specified intrastate rate on the ground that it is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act. (R. 376.)

Supplemental bills and second hearing before District Court

Just prior to the effective date of the restoration of the order of July 5, 1932, supplemental bills (R. 338, 463, 551) were filed with the District Court, and another hearing was held before that court on February 24, 1933. The court then denied a motion for a stay of the operation of the Commission's restored order, and the increased in-

trastate rates prescribed in that order were put into effect February 25, 1933.

February 24, 1933, the District Court rendered an opinion (R. 610) sustaining the validity of the Commission's order, and entered a final decree (R. 620). It also made finding of fact (R. 610) and conclusions of law. (R. 614.) From the final decree this direct appeal was taken.

SUMMARY OF ARGUMENT

I. The order in question, requiring removal of unjust discrimination against interstate commerce growing out of revenue losses resulting from unduly low state rates, is a valid exercise of the authority conferred by Section 13 (3) and (4) of the Interstate Commerce Act.

1. Predicated upon specific findings by the Commission of revenue losses resulting from unduly low state rates, and requiring increases in those rates to remove an undue burden upon the revenues of the interstate carrier, it is clearly an order of the character authorized by Section 13 (4). That the Act confers authority to issue such order was settled by this Court in *Wisconsin R.R. Commission* v. *C. B. & Q. R.R. Co.*, 257 U.S. 563, and reiterated in the previous decision in the case at bar, *Florida* v. *United States*, 282 U.S. 194, 215, in which, having regard to the particular facts in this case, the Court upheld the authority "to end an unjust discrimination as against interstate commerce *either* as between persons or localities, *or*

because of an undue burden upon the revenues of the carrier." Since the latter decision this Court has sustained Section 13 orders in *Georgia Commission* v. *United States*, 283 U.S. 765; *Alabama* v. *United States*, 283 U.S. 776; *Louisiana Commission* v. *United States*, 284 U.S. 125; *United States* v. *Louisiana*, 290 U.S. 70; and *Montana* v. *United States*, 290 U.S. —, decided November 13, 1933. In the last two cases the Commission's orders, like this one, required increases in intrastate rates solely because of unjust "revenue" discrimination.

(a) The Emergency Railroad Transportation Act, 1933, enacted after the order in question was issued, does not adversely affect the validity of the order. That Act seeks "to relieve the existing national emergency in relation to interstate railroad transportation", and amends three sections of the Interstate Commerce Act, including Section 15a by repealing the recapture clause and restating the rule of ratemaking; but it does not strike down or alter the Commission's authority under Section 13 to remove unjust discrimination against interstate commerce arising from unduly low intrastate rates, and does not rescind or alter the dovetail relation between the provisions of Section 13 and Section 15a. On the contrary, the relationship between the two sections is maintained and the amended Section 15a reenacts the purpose of Congress to provide and maintain "adequate and efficient railway transportation service at the lowest

cost consistent with the furnishing of such service." In *United States* v. *Louisiana, supra,* this Court sustained, five months after Section 15a was amended, an order of the Commission based wholly upon revenue discrimination caused by unduly low state rates.

2. Upon rehearing the Commission made findings amply demonstrating the unremunerativeness of the intrastate rates, the revenue losses that had resulted and would result from their maintenance, and the substantial character of the burden upon and discrimination against interstate commerce. These findings fully meet the test laid down in *Florida* v. *United States,* 282 U.S. 194. The increased intrastate rates prescribed in the earlier order were in effect more than two years, affording opportunity for definite ascertainment of the effect of those rates upon the carrier's revenues, and constituting a fair "traffic test." The Commission found that there was a substantial volume of traffic under the increased rates yielding a large gross revenue and a profit to the carrier; that if the Cummer scale had been applicable during that period the carrier would have suffered a loss of $290,283.19 in gross revenue; that the continued maintenance of the Cummer scale would cause the carrier to lose gross revenue of at least $100,000 a year; and ultimately, that the Cummer scale "places a substantial burden upon defendant's interstate revenues."

3. The finding that the Cummer scale rates were abnormally and unduly low was based upon exhaustive comparisons of those rates with numerous other rates on logs, and with rates on other low grade commodities, many of which had been fixed as reasonable interstate rates by the Commission.

4. The finding that the Cummer scale rates were insufficient to cover the cost of the service rendered was based upon voluminous cost evidence introduced by the carrier. A finding that intrastate rates are below the cost of the service is not a *prerequisite* to the issuance of an order under Section 13 to remove unjust discrimination against interstate commerce, but such finding is pertinent as showing an aggravated case of discrimination. The method used by the Commission in ascertaining the cost of the service was not contrary to, but in harmony with, *Northern Pacific Ry.* v. *Dept. of Public Works*, 268 U.S. 39.

5. The interstate log rates now in effect over the Coast Line's entire system for all distances are rates which the Commission has prescribed or approved as reasonable. This is sufficient. *Wisconsin Case, supra; United States* v. *Louisiana, supra.* The only disparity alleged or shown as between state or interstate rates was between the Cummer scale, application of which was limited to a maximum of 170 miles, and the interstate rates for corresponding distances. The Commission, in this proceeding, twice found and prescribed as

reasonable the interstate rates to the level of which it required the state rates to be raised in order to remove the discrimination, thus complying with the rule stated in *Georgia Commission* v. *United States*, *supra*. There was no complaint concerning the relationship between the state and interstate rates for distances greater than 170 miles; hence there was no occasion to prescribe interstate rates from southern Florida. The Commission thoroughly investigated the Coast Line's intrastate log traffic throughout Florida, and, although it found transportation conditions with respect to that traffic less favorable than conditions concerning transportation of interstate traffic, its order requires that intrastate rates be raised only to the level of interstate rates. The Commission has prescribed in other proceedings reasonable interstate scales of log rates generally over wide areas in the southeast.

6. There is no merit in appellants' contention that the Commission should have permitted the continuance of the Cummer scale in Florida because of recent reductions in log rates by other carriers in southern territory to meet truck competition. If sustained, the contention will require that whenever a carrier reduces particular rates to meet actual existing truck competition the same carrier and all others in the same general territory may be compelled to make like reductions in all their related rates, even at points where no such truck competition exists, and even though truck competitive rates

are lower than rates prescribed by the Commission as reasonable. The devastating effect upon the revenues of the rail carriers and upon their ability to afford adequate and efficient service is manifest. The Commission has held many times that maintenance by rail carriers of low rates between particular points for the purpose of meeting competition of other transportation agencies, such as carriers by water and motor trucks, does not unlawfully discriminate against shippers between other points not affected by such competition. The action of other southern carriers in establishing temporary experimental rates to meet truck competition on their lines is insufficient as a legal basis for the Commission to require the Coast Line to sacrifice revenue on its Florida log traffic where the evidence showed that the movement of logs by truck for substantial distances was negligible. Cf. *Texas & Pac. Ry. Co.* v. *United States*, 289 U.S. 627, 636, 649.

II. Lack of merit in appellants' contention that the court below should have granted a trial *de novo* to determine "jurisdictional facts" finds demonstration in the several Section 13 cases recently decided by this Court, in which Commission orders were sustained, though in none of them was a trial *de novo* in the district courts. Since, in a Section 13 case, the ultimate fact determined by the Commission is whether state rates cause unjust discrimination against interstate commerce, if district courts were required to determine that fact in a trial *de novo*, they would be compelled to retry the

whole case, to exercise administrative authority, to perform legislative functions, and to substitute their judgment for that of the Commission on the administrative question of fact as to whether such discrimination existed. This would result in the very confusion, conflict, and lack of uniformity which Congress sought by the Act to avoid. *Procter & Gamble Co.* v. *United States,* 225 U.S. 282. The one decision, *Crowell* v. *Benson,* 285 U.S. 22, relied upon by appellants for this contention, itself distinguishes cases of the kind there under consideration from cases like the one at bar. Appellants obtained in the court below the review to which they were entitled. That Court stated in its opinion that "we have examined the evidence independently and are led to the same conclusion that unjust discrimination exists."

ARGUMENT

I

The order in question, requiring removal of unjust discrimination against interstate commerce growing out of revenue losses resulting from unduly low State rates, is a valid exercise of the authority conferred by section 13 (3) and (4) of the Interstate Commerce Act.

1. The order is clearly one of the character authorized by section 13 (4)

Predicated upon findings of revenue losses resulting from unduly low State rates, and requiring increases in those rates in order to remove an undue burden upon the revenues of the interstate carrier, the order in question is clearly one of the character

authorized by section 13 (4). In view of repeated decisions by this Court it is no longer open to dispute that this section forbids two distinct kinds of discrimination, both caused by intrastate rates unduly low in their relation to interstate rates, as a result of which (1) intrastate shippers and localities obtain an undue preference and advantage while competing interstate shippers and localities suffer a corresponding disadvantage and undue prejudice; (2) the carriers, engaged in both interstate and intrastate commerce, compelled to carry the intrastate commerce at inadequate rates, are deprived of revenue to which they are justly entitled. As expressed by Chief Justice Taft in the *Wisconsin* case, 257 U.S. 563, 587, the words of section 13 (4) "unjust discrimination against interstate commerce" are not tautological of the preceding words prohibiting undue preference or prejudice as between persons or localities but—

> aptly include a kind of discrimination against interstate commerce which the operation of the new act, for the first time makes important and which would seriously obstruct its chief purpose,

namely, unjust discrimination against interstate commerce because of an undue burden upon the revenues of the carrier.

> Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate

> to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. *Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work.* (*Ibid.* 590, italics ours.)

All questions concerning the Commission's power, and the constitutionality thereof, to issue an order solely for the purpose of removing unjust discrimination against interstate commerce were settled by the Court's holdings in that case, in which the order, though not sustainable in its statewide scope because of discrimination against persons or places alone, was sustained in its entirety as one necessary to remove unjust discrimination against interstate commerce growing out of revenue losses.

The holdings in that case were reaffirmed by the Court in its previous decision in the case at bar, *Florida* v. *United States*, 282 U.S. 194, in which the Chief Justice said, at pages 210–211:

> The power of the Congress to authorize the Interstate Commerce Commission to es-

tablish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute. *Houston, East & West Texas Railway Company* v. *United States*, 234 U.S. 342; *Illinois Central Railroad Company* v. *State Public Utilities Commission*, *supra* (245 U.S. 493); *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, *supra*; *Arkansas Railroad Commission* v. *Chicago, Rock Island & Pacific Railroad Company*, 274 U.S. 597; *Alabama* v. *United States*, 279 U.S. 229. In the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a statewide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute. In construing the statute this Court has held that the general provision of section 13 (4) prohibiting "unjust discrimination against interstate commerce" and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with section 15a, both of which were added by Transportation Act, 1920 (secs. 416, 422, 41 Stat. 484, 488). There is what this Court has called a "dovetail relation" between the two provisions. The authority granted by section 13 (4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to

maintain an adequate national railway system.

As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay "a fair proportionate share" of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra; New York* v. *United States, supra* (257 U.S. 591) (pp. 585, 586).

In concluding his opinion, the Chief Justice said that "If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce *either* as between persons and localities, *or because of an undue burden upon the revenues of the carrier,* the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require." (Italics ours.)

Since that decision the Court has sustained section 13 orders in *Georgia Comm.* v. *United States,* 283 U.S. 765; *Alabama* v. *United States,* 283 U.S.

776; *Louisiana Comm.* v. *United States*, 284 U.S. 125; *United States* v. *Louisiana*, 290 U.S. 70, and *Montana* v. *United States*, 290 U.S. , per curiam, decided November 13, 1933. In the last two cases, recently decided, the Commission's orders, like that in the case at bar, required increases in intrastate rates solely because of unjust revenue discrimination.

(a) The Emergency Railroad Transportation Act, 1933, passed subsequently to the issuance of the order here under review, does not adversely affect the validity of the order and does not alter the Commission's authority to remove unjust discrimination against interstate commerce growing out of revenue losses from unduly low intrastate rates.

Separate briefs filed on behalf of several of the appellants suggests that the validity of the order in question is to be tested under subsequent legislation and so tested is invalid. *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, cited by these appellants, merely holds that legislation passed subsequently to the Commission's order there involved had rendered that case moot. The other two cases cited, *United States* v. *Schooner Peggy*, 1 Cranch 103, and *Gulf, Colo. & Santa Fe Ry. Co.* v. *Dennis*, 224 U.S. 503, hold to the effect that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes *and positively changes the rule which governs*, the law must be obeyed . . ." (Italics ours.) The new law here

in question does not render this case moot nor change the rule which governs.

Here, the subsequent legislation is Emergency Railroad Transportation Act, 1933 (c. 91, 48 Stat. 211, approved June 16, 1933). This statute, in Title I, enacts provisions "to relieve the existing national emergency in relation to interstate railroad transportation," and, in Title II, enacts amendments to sections 5, 15a, and 19a of the Interstate Commerce Act. Sections 5 and 19a, relating to acquisitions of control and valuation, are not relevant here. Section 15a is amended to read as follows:

> (1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service;

United States v. *Louisiana*, 290 U.S. 70, was decided five months after the approval of Emergency Railroad Transportation Act, 1933, but does not mention that Act. Although the point was not urged in that case, we feel confident that if the Emergency Act took away the Commission's authority over intrastate rates, as here urged by appellants, the Court would have so held.

> and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

The important changes made in section 15a are the repeal of the recapture clause and the revision of the rule of rate making. Provision is made for the termination of proceedings for recapture of excess income and for repayments from the liquidation of the general railroad contingent fund; and the paragraphs of section 15a which provided for the recapture of excess income and for the general railroad contingent fund are omitted from the section, as amended. In substitution for the provisions of section 15a relating to the adjustment of rates so that the carriers as a whole, or as a whole in rate groups, shall earn an aggregate net income equal to a fair return on aggregate property value, the section, as amended, provides that, in the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among others, to the factors specified in paragraph 2 of the new section, above quoted. The report of the House Committee explains these changes. (Report No. 193, 73d Congress, 1st Session.) Regarding the repeal of the recapture clause the report quotes the chairman of the legislative committee of the Interstate Commerce Commission as follows:

> Present conditions have brought sharply into the foreground what is perhaps the strongest objection of all. For the moment

practically all the railroads are financially weak, and nobody knows how long this condition will continue. It is probable that the revival of their credit will lag considerably behind the revival of business conditions. While I believe that their traffic and earnings will ultimately be restored they have a hard struggle ahead, not only with business conditions but also with competing forms of transportation. Repeal of recapture for the future is not of much present importance, for there is likely to be little, if anything, to recapture for some time to come.

Retroactive repeal covering the past is of very great importance. To the extent that we find amounts of any considerable size due in the proceedings now pending, there are few, if any, railroads which have cash enough on hand to pay them. * * *. To obtain the necessary cash it would for the most part be necessary to issue securities to replenish their treasuries, and there are few which are now able to issue securities on reasonable terms, if at all. * * * There are better uses to which the slender railroad credit, so far as it is available, can be put than to raise cash to pay to the Government excess income of the past which in most cases is more than balanced by the income deficiencies of the present. * * *. Summing up the situation we [the Commission] are of the opinion that the difficulties, disadvantages, and dangers of recapture far outweigh its possible advantages. This is true of the future, but it is even more true of the past,

particularly under the conditions which now exist and may be anticipated for some time to come. This being our conclusion, we see no escape from the conclusion that the present recapture proceedings should be discontinued and the money returned which is now in the contingent fund. * * * Nor do I feel clear that even in theory recapture of excess income is sound procedure. There is something incongruous in a system of regulation which finds it necessary to permit carriers to earn more than they ought to earn, and meets the difficulty by taking money away after it is received.

Respecting the new rule of rate making the report says:

The rule of rate making as rewritten in the proposed paragraph (2), found in section 205 of the bill, directs the Commission to give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service. It is difficult to conceive of a reasonable rate which would ignore any one of these considerations. The Commission as a fair and impartial body acting for the Congress will continue to give consideration to these factors. In the case of the power given to the

Commission to prescribe just and reasonable rates the committee does not believe that it is necessary to encumber the statutes with further language which might be mandatory in terms but which could add nothing further to the plain duty of the Commission under the law, and which might be interpreted to imply a distrust of the Commission in prescribing just and reasonable rates. The Commission will and must give consideration to all facts developed on the record and see to it that the record is enlightening as to such factors as are mentioned in the first section of this bill.

No change is made in section 13 (3) and (4), and it is manifest Congress did not intend to strike down the Commission's authority to remove unjust discrimination against interstate commerce growing out of unduly low intrastate rates, nor to rescind or alter the dovetail relation between the provisions of section 13 (4) and the purpose of section 15a, redeclared in the new bill, to maintain an adequate and efficient railway transportation service, in the public interest. The provision for the group method of rate making and the related provision for recapture of excess incomes of any carriers in the group earning more than a fair return were but subordinate provisions, along with many others, whereby the ultimate purpose was sought to be accomplished. There is no change in that ultimate purpose. The new act redeclares it, in the new section 15a and also in section 2 of Title

I. That section, creating the office of Federal Coordinator of Transportation to effect whatever economies may be possible, in order "to relieve the existing national emergency in relation to interstate railroad transportation," declares the purpose—

> to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation, * * *.

In view of the present emergency it is obvious that intrastate rates and the income from them are now not less important, but if possible more so, in maintaining an adequate national railway system.

The new act does not relieve the Commission of the affirmative duty "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." *Wisconsin* case, 257 U.S., *supra*. Cf. *New England Divisions Case*, 261 U.S. 184, 189–190; *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 477–478; *R.R. Comm.* v. *Southern Pac. Co.*, 264 U.S. 331, 341–342; *Texas & Pac. Ry.* v. *Gulf, etc. Ry.*, 270 U.S. 266, 277; *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244, 250. If that purpose is interfered with by a disparity of intrastate rates, the Commission is still "authorized to end the disparity by directly removing it, because it is plainly an 'un-

due, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words." (*Wisconsin* case, supra.)

It seems indisputable that had Congress intended to change the law in so important a respect as that urged by appellants, it would have used language expressing that intention plainly and unmistakably.

There is no such expression in the Emergency Act; and there is no ground for inferring an intention on the part of Congress to take the anomalous action of enacting new and additional legislation to relieve the present acute economic emergency by preventing and relieving obstructions to and burdens upon interstate commerce and in the same statute striking down existing provisions for the relief of other and possibly greater burdens upon that commerce. Inferences to be drawn from the Act indicate to the contrary. The provisions of section 10 enlarge the Commission's power over intrastate commerce in its relation to interstate commerce and grants new powers to the Coordinator in this respect. Paragraph (a) of that section provides that carriers subject to the Interstate Commerce Act affected by any order of the Coordinator or Commission made pursuant to Title I of the Act shall, so long as such order is in effect, be relieved from the operation of the antitrust laws and of all other restrains and prohibitions by law, *State* or Federal, with certain exceptions, insofar

as may be necessary to enable them to do anything authorized or required by such order; and paragraph (b) empowers the Coordinator to issue orders "which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State Commission" when such order is necessary, in his opinion, "to prevent or remove an obstruction to or a burden upon interstate commerce."

In view of these provisions, and in view of the provisions of section 13(4) of the Interstate Commerce Act placing the power and duty upon the Commission to prescribe rates to remove unjust discrimination against interstate commerce caused by State rates, which latter provisions remain unchanged, there is no ground for an inference that the changes made in section 15a were intended to strike down or alter any authority heretofore exercised by the Commission in respect of intrastate rates.

2. Upon rehearing the Commission made findings amply demonstrating the unremunerativeness of the intrastate rates, the revenue losses that had resulted and would result from their maintenance, and the substantial character of the burden upon and discrimination against interstate commerce. These findings fully meet the test laid down in *Florida* v. *United States*, 282 U.S. 194.

In its opinion upon the former appeal in this case the Court pointed out, 282 U.S., at page 212, that "If the action of the Commission is not simply

for the removal of undue prejudice against interstate commerce as between persons or localities, and the Commission undertakes to prescribe a statewide level of intrastate rates in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end." The Court further said that "in order to sustain the statewide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion." (*Ibid.*) Later in its opinion, page 214, the Court pointed out that "in dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other" while "in considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to income," that "the raising of rates does not necessarily increase revenue" but "may in particular localities reduce revenue instead of increasing it, by discouraging patronage."

And the Court condemned the earlier order because the Commission's ultimate finding of unjust discrimination was not supported by subordinate findings (1) as to the revenue which had been derived by the carrier from the traffic in question, (2) as to the revenues which could be reasonably expected under the increased rates, or (3) that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service. (*Ibid.*, 214–215.)

Upon rehearing voluminous evidence was introduced in this regard and from this evidence the Commission was able to make and did make these essential findings. In its report the Commission said—

> Of much assistance in the determination of the effect of increased intrastate log rates in Florida on the revenues of defendant is the fact that the increased rates prescribed by the former order were actually in effect for a substantial period and were applied on the traffic moving during that period. (R. 39–40.)

Based upon an exhibit introduced by the carrier (Ex. 61, R. 1101–1109) containing data as to all shipments that moved during the two-year period prior to the rehearing, that is, from February 8, 1929, to January 31, 1931, when the increased intrastate rates prescribed by the earlier order were in

effect, the Commission found that during this two-year period the total movement over the carrier's lines intrastate in Florida of the kinds of logs in question, to which the Cummer scale would have been applicable had it been in effect, was 18,602 carloads. (R. 40, 44, 65.) The Commission further found that these cars were shipped from 113 different origins to 20 different destinations in all parts of the state, and the hauls ranged from 6 to 169 miles. (Report, R. 50.)

The Commission found that the gross freight revenues actually collected on these 18,602 carloads aggregated $571,508.94, whereas, if the Cummer scale had applied, this movement would have produced gross freight revenues of only $281,225.75, or $290,283.19 less than those actually collected.[6] (Report, R. 40, 65.)

Averring that there is no condition at any point on its lines that would justify higher rates on logs than those applicable within the State of Florida, and having in mind the possible influence that low log rates in Florida might have upon the log rates in adjoining states, the carrier submitted evidence showing the volume of its log traffic in those states, and the total revenue losses it would suffer if the Cummer scale rates spread into those states.

[6] Restitution suits for the recovery of all amounts paid in excess of the Cummer scale rates on shipments during the period from February 8, 1929, to April 10, 1931, when the higher intrastate rates prescribed in the former order prevailed, were instituted and are pending. (R. 40, note.)

(R. 40-41.) This evidence showed that the movement of logs on its system in 1929 and 1930, including the long but not the short length logs in Florida, consisted of 3,450,765,300 pounds, of which the interstate movement consisted of 456,134,800 pounds, and the intrastate 2,994,630,500 pounds. The Commission found (R. 41) that the revenues from all of these logs amounted to $1,483,424.87, of which the revenue on interstate movements amounted to $256,654.12, and on intrastate to $1,216,770.75, and if the Cummer scale had been applicable on all its log movements the reductions in revenues would have been approximately as follows:

Intrastate:	
Virginia	$2,926.20
North Carolina	95,804.17
South Carolina	99,793.77
Georgia	29,068.53
Florida	290,283.19
Alabama	13,245.47
Interstate	141,259.88
Total	675,381.21

The volume of the Florida log movement during the period from February 8, 1929, to January 31, 1931, and during the succeeding five months from February 1 to June 30, 1931 (during which latter period the Cummer scale was restored, effective April 10, 1931) was a decline from the volume during the previous several years. The Commission found that this decline accompanied a general, drastic decline in all traffic, and was due to the general business depression, the depressed con-

tion in the log and lumber industry, the cessation of several movements of logs in trainload lots, due to exhaustion of particular tracts of timber, and the removal of several mills from uneconomical locations to new locations nearer the source of the timber supply. (R. 45.) One large mill made such a change of location shortly after the increased rates became effective. (R. 42–43.) On this subject the Commission said:

> It is manifest that if the Cummer scale produces less revenue than the cost of the service, declines in the traffic have the favorable effect of reducing defendant's losses and that [if the Cummer scale remained in effect] an increase in the traffic would only serve to augment those losses. (R. 51.)

As shown more fully later, the Commission found that the Cummer scale rates were unremunerative and insufficient to cover the cost of the transportation services performed under them.

Having considered the past and then present volume of the Florida and other log movements and the revenues therefrom, the Commission turned to consideration of the probable future volume of the traffic and the probable revenues therefrom under the Cummer scale and under increased intrastate rates. It referred to evidence showing the total amount of standing timber in Florida (R. 46–47) and how much of it is reasonably tributary to defendant's lines, (R. 47–48), to evidence showing specific movements of logs over the carrier's lines in

Florida including important movements of hardwood logs.[1] (R. 48–50), to evidence showing the number, size, and location of sawmills in Florida, (R. 50) and to other pertinent evidence, and upon this evidence made the following finding:

> The record as a whole warrants the conclusion that there will be a large Florida intrastate movement of logs over defendant's lines in the future. The movement at present is at a low ebb, but in view of depressed conditions the present movement can not be taken as the criterion for the future. In view of the vast quantity of timber in Florida tributary to defendant's lines, the large number of mills located on defendant's lines at widely scattered points in Florida, and the probability of the establishment of new mills, large and small, we entertain no doubt that the log traffic will increase well above the present volume when economic conditions change for the better. (R. 50–51.)

Although depressed economic conditions prevailed during the period that the intrastate rates prescribed in the former order were in effect, the Commission based its findings as to future revenue losses under the Cummer scale upon the actual

[1] The Cummer scale and the rates prescribed to supersede that scale applied on hardwood logs, such as ash, gum, hickory, and oak, as well as pine and cypress. See Report, R. 47 and note, and R. 49. One of the appellants, the Wilson Lumber Company, operates a hardwood mill at Perry, Fla. (R. 49.)

movement during that period. From the total movement in the two-year period (from February 8, 1929, to January 31, 1931), which was 18,602 cars, it deducted the number of cars in trainload movements that had ended, 3,740 cars, and took the average of the remainder (14,862 cars during the two-year period or 7,431 cars per year) as the probable future annual volume. (Report, R. 65.) It found:

> Under normal economic conditions it seems probable that the annual volume of the Florida log movement under rates the same as those previously prescribed will not be less than the average of this 2-year period minus the number of cars included in the discontinued trainload movements. This average is 7,431 cars. That the movement will not be less than this under normal conditions is confirmed by the fact during the five months immediately preceding the last hearing in this case, February to June, 1931, when conditions were abnormal, there were shipped over defendant's lines in Florida a total of 2,765 cars of logs. This movement was at the rate of 6,636 cars a year. We believe that the movement of logs intrastate in Florida over defendant's lines will not be materially curtailed under the rates which we here prescribe, which are the same or substantially the same, as the rates generally in effect and under which logs freely move throughout the South. (Report, R. 65.)

The Commission found that on the 14,862 cars remaining after deducting the 3,740 cars in the discontinued trainload movements from the total two-year movement of 18,602 cars, the freight charges collected were $171,069.88, and if the Cummer scale had been applicable, the freight charges would have been $232,939, or $238,130.88 less than those actually collected. (Report, R. 65–66.) This would be the loss during a two-year period. The yearly loss would consequently be about one half of this sum, or about $119,065.44. The Commission found:

> Accordingly, on the basis of an average of 7,431 cars a year under normal economic conditions, which basis we believe conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer scale, now in effect. (R. 66.)

The Commission's ultimate conclusion was that the application of the Cummer scale "places a substantial burden upon defendant's interstate revenues". (R. 66.)

Moreover, the Commission observed that "if the revenues yielded by the Cummer scale are not sufficient to cover the cost of the service, as the cost evidence indicates, it would follow that part of the above-stated amount would constitute a dead loss in net revenue." (R. 66.)

Appellants suggest insufficiency of the findings because there was no finding as to the revenue from the traffic under the Cummer scale prior to February 8, 1929. While there was no finding as to revenue from this traffic *as a whole* prior to that date, there were findings as to the total movement during each of the five years 1926–1930 (R. 42) and findings as to the volume of movement of and the revenues from the traffic to the larger mills. (R. 43, 44, 48, 50.)

There is no better way to test the effect of new freight rates upon the revenues of a railroad than to put the rates into effect and give them a trial. The actual application for a period of 26 months of the increased intrastate rates prescribed in the former order afforded opportunity to ascertain definitely the effect of those rates on the carrier's revenues. This constituted a fair "traffic test" and the Commission found from the evidence that there was a substantial volume of traffic under the increased rates, yielding a large gross revenue, which included a profit from the operation. In view of these findings from evidence as to current operations, it seems clear it was unnecessary for the Commission to make more definite or fuller revenue findings in respect of the much earlier period, when conditions were drastically different, as shown above.

We submit that the Commission's findings upon rehearing respecting the revenue effect of both the

old and the new intrastate rates fully meet the test laid down by this Court in the former opinion in this case, and that the findings are even fuller than those made in other section 13 cases in which the Commission's order has been sustained by this Court, including the *Wisconsin,* 257 U.S. 567, *New York,* 257 U.S. 591, *Louisiana Sand & Gravel,* 284 U.S. 125, *Louisiana Surcharge,* 290 U.S. 70, *Alabama,* 283 U.S. 776, *Georgia,* 283 U.S. 765, and others.

3. The finding that the Cummer scale rates were abnormally and unduly low was based upon exhaustive comparisons of those rates with numerous other rates on logs and with rates on other low grade commodities, many of which had been fixed as reasonable interstate rates by the Commission in other cases

One fact alone practically demonstrates the abnormal lowness of the Cummer rates—the fact that they were only about half of the rates on logs prescribed by the State Commission. That Commission prescribed "Class P" rates for logs, lumber, and wood, having found them reasonable "after an extended investigation, not only of the lumber industry in this State and adjoining territory, but also of the financial condition of the carriers."[8] They were prescribed by the Florida Commission as maxima for all distances in Florida. The At-

[8] Quoted from a letter written by the Chairman of the Florida Railroad Commission, dated August 18, 1915, reproduced in Appendix A of report; R. 71; see also other letters of Florida Commission reproduced in Appendix A, R. 68–71; see also R. 33.

lantic Coast Line "applied the Cummer scale rates for distances of 170 miles and less, which are substantially lower than the Class P rates for those distances, and has maintained the full Class P rates for distances over 170 miles." (Report, R. 33.). For example, from Secotan to Jacksonville, 164 miles, the Cummer scale rate of 3.7 cents applied, whereas from the next station beyond, Eridu, to Jacksonville, 175 miles, the full class P rate of 8.33 cents was applicable. (The Coast Line's *interstate* rate for both these distances was 8 cents per 100 pounds. From Cross City to Jacksonville, 116 miles, the Coast Line's Cummer scale rate was 3.2 cents, whereas the Florida Commission's Class P rate for that distance was 6.66 cents—more than twice the Cummer scale rate. The Coast Line's *interstate* rate for 116 miles was 6.5 cents. (See Appendix B to report, R. 72A. The rates of the Georgia, Southern & Florida Ry. there shown, in column 4, are the same as the Florida Commission Class P rates. (See original record, p. 452.)

Not only were the Cummer rates lower than the Florida Commission log rates, but they were lower than the intrastate log rates maintained contemporaneously by other Florida railroads. For example, the Florida intrastate rates of the Seaboard Air Line and the Georgia, Southern & Florida for 115–120 miles were 6.19 cents and 6.66 cents, respectively, while the Coast Line's Cummer scale rate for that distance was 3.2 cents. (See

Appendix B, R. 72A, also Appendices C and D, R. 73-75.)

The revenue under the Cummer scale for distances up to 40 miles, at the average weight of 56,754 pounds (R. 53), was $9.70 per car (rate 1.71 cents per 100 pounds) and might be as low as $8.55 per car if loaded only to the carload minimum of 50,000 pounds. Under the prescribed rate of 4 cents for 40 miles the revenue is $23.70 per car of 56,754 pounds and a minimum of $16 at the carload minimum of 40,000 pounds. For the average distance of 81.36 miles (R. 53) the revenue under the Cummer scale at the average weight of 56,754 pounds was $13.05 per car (rate 2.3 cents); under the prescribed rate, 5.5 cents, the revenue is $25.71."

The earnings per ton-mile under the Cummer scale for 160 miles were only 4.25 mills. The car-mile earnings under that scale, based on a lading of 60,200 pounds, were only 12.8 cents. (R. 37–38.)

There was the further showing that the Cummer scale rates were only about half of the rates prescribed by the Commission as reasonable for application in the southeast, including Florida, on such low grade, heavy loading commodities as sand and gravel. (R. 38.) Further the Cummer scale rates were much lower than reasonable log rates prescribed by the Commission for application in Cen-

"For other per-car revenues under Cummer scale as compared with per-car revenues on other important "low grade" commodities, see Appendix D to report, R. 74–75.

tral Freight Association Territory where the traffic density is greater, the operating costs lower and transportation conditions in general more favorable than in Southern Territory. The rate there prescribed for 170 miles was 12.35 cents, whereas the rate for the corresponding distance under the Cummer scale was only 3.70 cents. (R. 36–37.)

These and many other facts, established by the voluminous record, appear in the Commission's report. See especially R. 32–38 and Appendices B, C and D, R. 72–75. The fact that many of the comparative rates were prescribed by the Commission lends great weight to the probative value of this evidence. *Louis. & Nash. R.R.* v. *United States*, 238 U.S. 1, 15–16.

The Commission found that—

> The above evidence warrants the conclusion that the Cummer scale rates are abnormally low

and affirmed the finding in the first report that they are "less than reasonably compensatory." (R. 37.)

As shown in the Commission's report on second rehearing and as explained later in this brief (section 6, *infra*), many southern carriers, other than the Atlantic Coast Line, have recently reduced their log rates to very low levels temporarily in an effort to meet truck competition. These reductions were to levels far below the reasonable log rates prescribed by the Interstate Commerce Commission for interstate application and by southern State Commissions for intrastate application. The fact

of these reductions, called to the Commission's attention after the issuance of its order of July 5, 1932, does not detract from the force of the Commission's finding in that report, which finding along with all its other findngs was reaffirmed in the report on second rehearing, that the Cummer scale rates were abnormally low and less than reasonably compensatory. Depressed rates, established voluntarily by a carrier to meet competition, are not acceptable as comparative rates to test the legality of rates for application in localities where such competition is not compelling. (See *Louis. & Nash. R. Co.* v. *United States*, 238 U.S. 1, 12.)

4. The Commission's finding that the Cummer scale rates were insufficient to cover the cost of the service rendered was based upon voluminous cost evidence and upon the Commission's own calculations from the basic figures and data contained in that evidence

In the Commission proceeding the carrier urged that "the revenues produced by the Cummer scale are insufficient to cover the cost of the service performed; that no traffic is of valu from a revenue standpoint unless it yields more revenue than the cost of its handling; that the carrier's study of the result of the operation under the Cummer scale is conclusive to it that such operation yields it no profit, but, on the contrary, *results in an actual loss on the log traffic as a whole.*" (Italics ours.) (Report, R. 51.) In support of its contention that the Cummer scale results in losses, the carrier submitted voluminous evidence bearing upon the cost

of transporting logs in Florida. This evidence is painstakingly reviewed in detail in the Commission's report. (R. 51–64.) The conclusion was reached that although it is impossible, on a system like the Coast Line, engaged in the general transportation of all kinds of freight and of passengers, to determine the exact cost of transporting any one commodity, yet the evidence submitted in this case was convincing "that the defendant's revenue under the Cummer scale of $15.12 per car for transporting a car of logs weighing 56,754 pounds a distance of 81 miles, and transporting the empty car back, is insufficient under all the circumstances and conditions to cover the full cost of the service." (Rep., R. 63–64.)

Appellants urge that this finding should be rejected on the ground that in reaching it the Commission gave consideration to "system average costs." But though this finding be rejected, the validity of the order would not be affected, for even if the Cummer scale rates were *above* the cost of the service but yet were unduly low in their relation to comparable reasonable interstate rates and were found to cause an unjust discrimination against interstate commerce, a valid order under section 13 (4) could issue. A finding that the intrastate rates are below the cost of the service is not essential under section 13, and indeed in no other section 13 order upheld by this Court has there been such a finding. In *Louisiana Comm. v. United States,* 284 U.S. 125, lack of cost of evidence was

urged, without avail. Where, as here, however, the intrastate rates are so low as not to cover the cost of the service, they fail to bear their fair proportionate share of maintaining the carrier and cause an actual out-of-pocket loss, resulting in unjust discrimination against interstate commerce of an aggravated character. Such a finding seems not impertinent. Therefore, it may not be amiss to briefly answer appellants' contention respecting this finding.

The Commission did not accept "system average costs" as the cost of transporting logs in Florida. It rejected such a figure. The carriers submitted evidence showing, on a gross ton-mile basis, the average of certain of its costs in Florida. For convenience, those costs were denominated "out-of-pocket" costs but they did not purport to cover all out-of-pocket costs but only those charged to particular accounts covering "road train expenses." (See Report, R. 51–52.) A unit cost figure of 0.0882888-cent per gross ton-mile was developed as the "average out-of-pocket expense" of handling all traffic in Florida. (R. 52.) In declining to accept this figure as indicating the carrier's average out-of-pocket cost of transporting logs in Florida, the Commission pointed out that much of the traffic there consists of fruits and vegetables which require special service, the cost of which enters into the average out-of-pocket cost, apparently tending to make it *higher* than the actual out-of-pocket cost of the log traffic, and leading to the conclusion that

the average cost figure submitted was higher than the actual out-of-pocket cost of the Florida log traffic. In thus rejecting the average figure the Commission cited *Northern Pac. Ry.* v. *Dept. Public Works*, 268 U.S. 39 and *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I.C.C. 25, 52. (R. 58.)

The Commission was able, however, from the mass of data before it, including system average costs and other basic figures, to develop, by its own calculations, a figure that "might be said to be *less* than the cost in Florida." (R. 61.) Based on comparisons as between the part of the system in Florida, on the one hand, and the system as a whole, on the other hand, of freight-traffic density, freight-service train miles, freight-service locomotive miles, loaded freight car-miles, empty freight car-miles, revenue ton-miles, and loaded and empty cars per train, in all of which Florida compared unfavorably with the system as a whole, (R. 59) the Commission found:

> There appears to be no doubt that the operating costs per unit are generally higher in Florida than the average for the defendant's system as a whole either including or excluding Florida. (Report, R. 59.)

In view of this fact, the Commission said, system figures including Florida, which were not questioned, might be utilized as a basis for approximating the cost of transporting logs in that State. "Ordinarily," the Commission said, "it would be

unsound to use a system unit cost to determine the cost in a particular State, but since it is indisputable that unit costs are higher in Florida than elsewhere on the system, it seems clear that system unit costs may be used to find a cost that may be said to be less than the cost in Florida." (Report, R. 60–61.) Then, by the method explained in the report (R. 61–64) the Commission found the *total operating expenses* to be $17.07 per car and the *total cost per car*, being the total operating expenses plus taxes and interest on investment, to be $24.69 per car, as the cost of transporting the average car of logs in Florida the average distance of 81.36 miles. (R. 63.) The Commission was careful to explain that these cost figures *understated* the actual cost. (R. 63.) It was not disputed that the average revenue under the Cummer scale for the average haul of 81.36 miles was $15.12 per car. (R. 55, 63.)

Thus, while the Commission did not find the exact cost per car of transporting logs over the carriers' lines in Florida, it did find a figure which, though *understating* the cost, was substantially *higher* than the revenue per car under the Cummer scale. In making this finding the Commission clearly did not commit the error pointed out by this Court in *Nor. Pac. Ry. Co.* v. *Dept. Public Works*, 268 U.S., *supra*, where the State body used system averages without making any allowances for local conditions.

The Commission's conclusion that the revenue under the Cummer scale was "insufficient under

all the circumstances and conditions to cover the full cost of the service" (R. 64) was well supported and justified by the evidence.

5. The interstate log rates now in effect over the Coast Line's entire system for all distances that logs ordinarily move are rates which have been prescribed or approved by the Commission as reasonable. These reasonable interstate rates afford a lawful standard for comparison with the Cummer scale rates applying in Florida

The only disparity alleged or shown in this case as between the state and interstate rates was the disparity between the Cummer scale rates, applying for distances up to 170 miles, and the interstate rates for corresponding distances. For distances greater than 170 miles there was no disparity as between the Coast Line's Florida intrastate log rates and its interstate log rates. The Florida intrastate log rates maintained by the Coast Line for distances greater than 170 miles were the Florida Commission Class P rates, which were on a much higher basis than the Cummer scale rates, and were substantially the same, mile for mile, as the interstate log rates generally applicable in southern territory on the Coast Line and other southern railroads. (Reports, R. 32, 373.)

By its orders in this proceeding the Commission corrects this disparity. In its original report and order the Commission prescribed a scale of reasonable interstate rates on logs over the Coast Line from Florida to Georgia for distances of 170 miles and less. (The points of origin from which these

rates apply are obviously in "northern" Florida because such points would in no case be more than 170 miles south of the Georgia-Florida State line.) This scale became effective February 8, 1929, and has since remained continuously in force. In the report upon rehearing the Commission, after observing that the interstate rates prescribed in the earlier report "are apparently satisfactory to all interested parties," (R. 31), again found them to be reasonable

> * * * we find that the rates therein prescribed [earlier report], which are now in effect, are reasonable. (R. 66.)

These reasonable interstate rates afforded a lawful standard for comparison with the intrastate (Cummer scale) rates applying for the same distances; and, in order to remove the found discrimination, the Commission required, by the order here under review, that the Cummer scale rates be increased to the level of the reasonable interstate rates for the same distances.

Appellants' objection that the Commission made no investigation of the interstate log rates from southern Florida and, therefore, was without power to fix intrastate rates for application in that part of the State, overlooks the fact that from southern Florida to the Georgia State line the distances over the Coast Line range up to 400 miles. There was no complaint respecting the relationship between the state and interstate rates for such distances, nor, as stated, for any distances over 170

miles. Log rates for such long distances are not of practical importance, because log traffic is short-haul traffic. It requires about three cars of logs to produce one car of lumber, and for this reason saw-mills cannot economically afford to pay even reasonable rates on logs for long distances. The average haul of logs on the Coast Line intrastate in Florida is approximately 81 miles (R. 53) while the average on that line in interstate movements is 109 miles. (Report, Appendix D, note, R. 75.) Log rates are published in the tariffs for distances up to 800 miles, but for the longer distances they are virtually "paper" rates on which no substantial traffic moves, and are put in to cover rare or exceptional shipments. The present record discloses that there is no movement of logs over the Coast Line from southern Florida to interstate destinations. For this reason alone the objection is without merit.

The Commission thoroughly investigated the intrastate log traffic of the Coast Line throughout the State. As a condition to increasing the intrastate rates for distances not exceeding 170 miles in southern Florida, it clearly was not necessary that it prescribe interstate rates for the much longer distances from that portion of the State, from which no interstate log shipments move. In *Georgia Comm. v. United States*, 283 U.S. 765, 770, the Court said:

> It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or

> discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level.

In the case at bar the Commission has determined and prescribed reasonable interstate log rates for distances corresponding to those of the state rates alleged and shown to be unduly low. To remove the discrimination it has increased the state rates to the level of these interstate rates. Although the less favorable transportation conditions in Florida might have justified the prescribing of intrastate rates on a *higher* level than the reasonable interstate rates, the Commission did not do so, but prescribed for Florida the *same* rates, mile for mile, as the interstate rates.

It may be noted that although in this particular proceeding the reasonable interstate rates prescribed by the Commission were only from northern Florida to Georgia for distances of 170 miles and less, yet in other proceedings the Commission has fixed reasonable interstate log rates for other localities in the South for the same and longer distances and these rates are now in effect on the Coast Line. In complying with the order the Coast Line established the rates for 170 miles and less as prescribed in the order, and, at the same time, established for greater distances rates which had been repeatedly prescribed or approved by the

Commission as reasonable in other proceedings. The scale of interstate rates established by the Coast Line following the order in this case covers distances up to 450 miles (R. 34). The scale is shown in Appendix B to the report on rehearing for distances up to 300 miles. (R. 72A.) It will be noted that the scale begins with 2.5 cents for distances of 5 miles and under, gradually increases with the distance until it reaches 8 cents at 170 miles, and is proportionately increased to 11 cents at 300 miles. Above that distance the scale is unimportant, because logs seldom move by rail even that far.

This scale was the same as had been found reasonable for application on logs between various points in the South in four previous cases (see R. 33, 35–37), having been based on the Pierpont scale. It has become what may be termed the standard scale for log rates in the South. In *Farris Hardwood Lbr. Co.* v. *L. & N. R.R.*, 178, I.C.C. 671, 676–677, the Commission found:

> Rates based on the Pierpont scale, and rates closely related thereto, by virtue of our orders and by voluntary action of the carriers, have widespread application on log traffic throughout the Southeast. Such rates have been prescribed or approved by us in *Pierpont Mfg. Co.* v. *S. Ry. Co.*, 50 I.C.C. 81, from points in South Carolina to Savannah, Ga.; in *North Vernon Lumber Co.*

v. *I. C. R.R. Co.*, 61 I.C.C. 355, as net rates on hardwood logs from points in Mississippi to points in western Tennessee on the Illinois Central; in *Southern Veneer Asso.* v. *A. C. L. R.R. Co.*, 62 I.C.C. 669, and *Hudson Veneer Co.* v. *Southern Ry. Co.*, 172 I.C.C. 589, on poplar and gum logs from points in South Carolina to destinations in North Carolina; in *Southern Cotton Oil Co.* v. *A. C. L. R.R. Co.*, 120 I.C.C. 190, on logs, except walnut, cherry, and cedar, from points in South Carolina to Savannah; in *Rapp Lumber Co.* v. *Louisville & N. R. C.*, 159 I.C.C. 749, as a basis for transit rates on logs, except walnut and cherry, from points in Georgia, Kentucky, Tennessee, and Virginia to Barbourville, Ky.; and in *Meridian Traffic Bureau* v. *Sumter & C. Ry. Co.*, 172 I.C.C. 255, on hardwood logs from points in Alabama to Meridian, Miss. Similar rates have been prescribed by the Alabama and South Carolina commissions. Corresponding rates are applicable between points on the Atlantic Coast Line in North Carolina and points in Virginia, and between points on the line of the same carrier in Alabama and Georgia; also between stations on the Southern Railway, generally, including points in Kentucky and Tennessee, for distances up to 500 miles.

Prior to filing its complaint with the Interstate Commerce Commission which initiated this proceeding, the Georgia Commission had adopted the scale for intrastate application in that State, but

suspended its application (temporarily) because of the existence of the Cummer scale in Florida.[10] (R. 34.)

In its report upon rehearing in the case at bar the Commission found that the Atlantic Coast Line had put the scale in effect for uniform application over its entire system (R. 34), except from southern Florida, from which, on account of unfavorable transportation conditions and higher cost of service, the rates were made 15 percent higher than the standard scale.[11] This exception is unimportant

[10] Georgia shippers protested to the Georgia Commission that the intrastate rates in Georgia should not be higher than the Cummer scale in Florida. This situation led the Georgia Commission to file its complaint with the I.C.C. in this case.

In the Commission proceeding the Atlantic Coast Line took the position that while it had carried out in good faith and without complaint its contract for the Cummer scale rates, it was unwilling to apply them elsewhere on its system, and it strongly opposed the use of the Cummer scale rates as a measure of reasonableness for Florida-Georgia interstate rates.

The contract has since become inoperative. It covered the movement of pine logs from Perry and Lafayette Counties, in the northwestern part of the Florida peninsula, to Eastport. The mill at Eastport has since been moved to a more economical location at Foley near the source of this mill's timber supply.

[11] No complaint has been made by anyone against these rates. In *Southern Class Rate Investigation*, 100 I.C.C. 513 (585, 626, 646); 128 I.C.C. 567 (594, 602) the Commission prescribed class rates for application throughout Southern territory and made class rates for the part of the haul within the Florida peninsula 15 percent higher than for the remainder of Southern territory. (R. 34, 36, 60, 374). See also *Petroleum and its Products*, 171 I.C.C. 286, 332.

because, as previously explained, the distances are so great that no logs shipments have moved from southern Florida to interstate destinations.

Thus, the interstate log rates now in effect over the Coast Line's entire system for all distances that logs ordinarily move are rates which have been prescribed or approved by the Commission as reasonable. This is sufficient. *Wisconsin Case, supra; United States* v. *Louisiana*, 290 U.S. 70, 82.

(a) The objection that there has been no substantial interstate movement of logs over the Coast Line from northern Florida to Georgia is irrelevant, since the primary concern of the present order is to prevent revenue losses from the unremunerative intrastate rates and to require that this intrastate traffic shall pay "its fair proportionate share of the cost of maintenance" of the interstate carrier.

The objection that there has been no substantial interstate movement of logs over the Coast Line from northern Florida to Georgia might be relevant if the Commission's order were predicated solely on findings of undue prejudice against interstate shippers, but if so the objection would lack merit, for even an occasional shipment of logs over northern Florida to Georgia is entitled to nonprejudicial rates, and the Commission's report indicates that an occasional carload has moved. (R. 67.) And it seems not improbable that a substantial traffic in logs from the timber in northern Florida to the sawmills in southern Georgia might develop under nondiscriminatory rates and after

this litigation relating to those rates is finally settled. But it seems obvious its failure to develop could not justify continuance of the unduly low intrastate rates in Florida, with the resulting substantial revenue losses, if the carrier is entitled to "a reasonable compensatory return for all the work it does." (*Wisconsin* case, 257 U.S., 589.) Directed against the order as based upon findings of unjust discrimination against interstate commerce growing out of revenue losses from the intrastate rates, the objection seems wholly irrelevant. As previously shown, this carrier's Florida log traffic is an important one, and the revenue from that traffic has a substantial influence upon its total revenues. (R. 38-39.) The present order is not concerned with any particular interstate traffic of the carrier; its concern is primarily to prevent revenue losses resulting from the unremunerative intrastate rates and to require that this intrastate traffic shall pay its "fair proportionate share of the cost of maintenance" of the interstate carrier. (*Florida* case, 282 U.S., 211.) It seems this must be so even though no interstate log movement takes place on the particular part of the carrier's system that crosses the Florida-Georgia State line.

6. The Commission's finding that the maintenance of the Cummer scale "to meet what little truck competition could be met would greatly decrease the revenues of defendant and would not be warranted" is not arbitrary but is fully supported and justified by the evidence introduced at the first and second rehearings

The Commission granted a second rehearing upon the petition of the Florida interveners which set forth that after the issuance of the report and order of July 5, 1932, southern rail carriers other than the Atlantic Coast Line had reduced their log rates to substantially the basis of the Cummer scale. The purpose of the second rehearing was to receive evidence "respecting any change in the rates on logs since the close of the previous hearing, the circumstances connected with and the conditions which occasioned such changes, and whether such circumstances and conditions, or any of them, are present with respect to the Florida intrastate log rates of defendant." (Report on Second Rehearing, R. 363.) The evidence introduced at this rehearing showed that a number of carriers operating in southern and southwestern territories had in recent months established "per-car" rates on logs which were substantially the same as the Cummer scale, and that these rates had been made experimentally in an effort to meet truck competition which the carriers' investigations had shown to exist. (R. 363, 365.) While the extent of this truck competition was not shown, the Commission said "it apparently was sufficiently compelling, in

the judgment of the managers of these railroads, to warrant the establishment of these rates as an experiment." (R. 365.) Representatives of several of these railroads testified "they hoped that the experiment of publishing these rates would prove successful after sufficient time had elapsed to fully test it, but that so far the experiment had not proved successful, that they had regained relatively little of the log traffic from the trucks," and that there was, "little, if any, hope of securing much of the traffic that now moves by truck for distances under 25 miles, a considerable portion of which never has moved by rail. (R. 366.)

The regular log rates of most of these carriers are still published and will again become effective when the special, truck competitive rates expire. (See Report, R. 365.) Most of these latter rates are "transit" rates and all of them, except those on one railroad, apply for maximum distances of 100 miles. (R. 363–365.)

The Freight Traffic Manager of the Atlantic Coast Line testified that one of his important duties is to keep informed as to the extent to which trucks are taking business from his railroad and as to the advisability and practicability of the railroad reducing its rates because of truck competition; that there had been no substantial change in conditions in Florida since the previous hearing; that the movement of logs by truck in the territory served by the Coast Line, including Florida, is

negligible and not sufficient to warrant reductions in rates to save such traffic from the trucks; and that the log traffic which moves by truck for distances under 25 miles could not be regained by any rates which the Coast Line might make because in most instances the distance from the woods to the railroad stations represents such a large percentage of the distance to the mills as not to justify transfer of the logs from trucks to railroad cars. (Report, R. 371–372.)

The Commission found that "the record warrants the conclusion that truck competition, and, to a lesser degree carrier competition, has been sufficiently compelling in the judgment of the responsible traffic officials of the various railroads operating in the western portion of southern territory to warrant the establishment experimentally of the low per-car rates on logs hereinbefore referred to; that these reduced rates have not as yet succeeded in regaining for the railroads which established them any great amount of log traffic; that it is doubtful if the log traffic now moving by truck for the shorter distances, particularly 25 miles and under, can be regained by these or any other rates that the carriers could make; that there is but little competition between defendant and trucks for the movement of logs intrastate in Florida for distances over 25 miles and, in the judgment of defendant's responsible traffic official, it is not of sufficient importance to warrant the establishment or main-

tenance of subnormal rates in an effort to regain it; and that the circumstances and conditions which occasioned the establishment of the experimental reduced per-car rates on logs by other railroads in a section of southern territory quite widely separated from that in which defendant operates, are not present with respect to the intrastate log traffic over defendant's lines in Florida." (R. 373–374.)

This evidence and the findings upon it affirmed the finding that had been made in the report upon the first rehearing, as follows:

> In the Florida log transportation some competition from trucks is met but only to a very slight degree. It is not shown that logs can or will be transported by trucks except for very short distances, nor that truck competition was or will be increased under advanced rates. (R. 51.)

In its report upon the second rehearing the Commission concluded that the movement of logs in Florida "has not been shown to have gone to the trucks to any substantial extent where the hauls are over 25 miles and this record warrants the conclusion that truck competitive rates for distances under 25 miles would regain little, if any, traffic, and that to require defendant to continue to maintain the Cummer scale to meet what little truck competition could be met would greatly decrease the revenues of defendant and would not be warranted." (R. 375.)

The Commission was careful to say, in respect of the temporary per car rates put in by southern carriers other than the Atlantic Coast Line in an effort to meet truck competition, that it does not approve of rates published in amounts per car regardless of weight, and nothing contained in its report should be considered as an approval of rates so published on logs; and the Commission further said:

> These per-car rates on logs are not here in issue and no one has complained to us in any other proceeding that they are unreasonable, undnly preferential, or otherwise unlawful. (R. 375.)

Cf. *Int. Com. Comm.* v. *Louis. & Nash. R.R.*, 227 U.S. 88, 92.

Having in mind the possibility that truck competition in certain localities or between certain points in Florida might arise and become of sufficient intensity to warrant reductions in the Coast Line's log rates to meet such competition where it existed, the Commission inserted a *saving clause* in its report under which, with Commission approval, reductions to levels under the minimum intrastate rates prescribed in the order might be made. This saving clause is broad enough to cover that contingency or any other in which such reductions might be desirable, for it provides that the Commission's findings are without prejudice to the right of any interested party to apply for a modi-

fication of the findings and the order as to any specified intrastate rate on the ground that it does not relate to interstate rates in such a way as to contravene the provisions of the Interstate Commerce Act. (R. 376.) In the *Wisconsin* case, 257 U.S. 563, 591, the Court approved a similar clause, and of it said:

> It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion.

Appellant contends that the action of the Commission in prescribing minimum intrastate log rates on the Coast Line in Florida at a time when other southern carriers were reducing their log rates down to the level of the Cummer scale rates,

for the purpose of meeting truck competition, was arbitrary, unreasonable, and discriminatory.

This contention raises a question of great importance, for if it were sustained it would mean that whenever a carrier or a group of carriers reduced particular rates to meet truck competition where it existed, those carriers and all others in the same general territory would be compelled to make like reductions in all their related rates, even at places and localities where no truck competition existed and even though the reductions made to meet the truck competition were down to levels below those found by the Interstate Commerce Commission to be reasonable. The devastating effect upon the revenues of the railroads and upon their ability to afford adequate and efficient service, is obvious. It seems manifest that the principle underlying this contention is utterly untenable.

Other southern carriers, faced with severe truck competition, were forced to sacrifice their revenue by making drastic reductions in their rates in an effort to meet that competition. Appellants would require the Coast Line to continue to sacrifice its revenue by maintaining the Cummer scale, already as low as the truck competitive rates established by the other southern lines, despite the absence of truck competition in Florida of sufficient severity to require the maintenance of such low rates, and despite the Commission's finding and conclusion, after very careful consideration and upon a full

record disclosing all the facts, that the movement of logs in Florida has not gone to the trucks to any substantial extent where the hauls are over 25 miles, that truck competitive rates for distances under 25 miles would regain little, if any, traffic, and that to require the Coast Line to continue to maintain the Cummer scale to meet what little truck competition could be met would greatly decrease the carrier's revenues and would not be warranted. (R. 375.) It seems obvious the Commission's action cannot be characterized as either arbitrary or unreasonable.

The Commission has held many times that the maintenance by rail carriers of low rates between particular points for the purpose of meeting competition of other transportation agencies, such as water carriers and motor trucks, does not unlawfully discriminate against shippers between other points not affected by such competition. For instance, in *Rate Structure Investigation, Part 3, Cotton*, 165 I.C.C. 595, the Commission fixed a scale of rates on cotton in the Southwest. Later, truck competition of great intensity grew up near the Gulf ports, and the railroads made substantial reductions from the maximum reasonable rates in order to meet the truck competition, while maintaining the full maximum rates prescribed by the Commission between points where the truck competition did not exist. In a supplemental report, 174 I.C.C. 9, the Commission said:

> It would seem that points from which trucks do not operate can not be heard seriously to complain if the rail carriers reduce their rates within the zone of truck operations for competitive reasons, so long as they do not go below a reasonably compensatory basis, because if the railroads do not haul the cotton at lower rates the trucks will. (*Ibid.*, 15.)

The Commission further observed "that the transportation of cotton to the Texas ports by motor trucks, which has developed during the past few years, has made severe inroads upon the traffic and revenues of the respondents [rail carriers] which they can ill afford to stand." (*Ibid.*, 15.)

In *Refined Petroleum Products in the Southwest,* 171 I.C.C. 381, 174 I.C.C. 745, the Commission, after prescribing a comprehensive readjustment of the rates on refined petroleum products within the Southwest, permitted reductions from the basic scale in clear instances of competition by other transportation agencies such as motor trucks and pipe lines, stating it believed that the carriers "should be permitted to meet such competition of other transportation agencies, provided that the rate is compensatory and provided that no unlawfulness is created." (174 I.C.C. 750–751.) And after stating that recently in *Rate Structure Investigation, supra,* it permitted departures from the relation prescribed between certain points

where reductions were necessary to meet truck competition, held:

> Under such circumstances, there can not be said to be undue prejudice in connection with rates between points not affected by such competition. (174 I.C.C. 751.)

In *Procter & Gamble Co.* v. *Alton & S. R. Co. et al.*, 183 I.C.C. 365, in which it was alleged that carload soap rates were unreasonable, complainant contended that continuance of the present rates on soap would result in increased diversion of the traffic to waterways and trucks and that a reduction in the rates must be required by the Commission, if the traffic is to be retained by the railroads. The Commission declined to reduce the rates on the ground, quoting from its report in *Lindsay Bros.* v. *B. & O.*, 16 I.C.C. 6, in which it said:

> We think it clear that while water competition may be availed of by a carrier as its justification and excuse for rates that are lower than would otherwise be lawful under sections 2, 3, or 4 of the act, the existence of such competition is not in itself a ground upon which a shipper may demand a lower rate. It is the privilege of a carrier, in its own interest, to meet such competition, but it is not the privilege of a shipper to demand less than normal rates because of the existence of a competition which the carrier in its own behalf does not choose to meet.

Further the Commission said it had "made similar statements with respect to the weight to be ac-

corded to the existence of water competition when we are fixing maximum reasonable rates" and that "the statements made in those cases as to water competition apply with equal force to truck competition." (183 I.C.C. 367, 368.)[*]

We submit that these holdings are sound and conform to the letter and spirit of the Interstate Commerce Act. Applied to the facts in the case at bar, these holdings lead to the conclusion that the Florida log shippers cannot demand the restoration of the unduly low, unremunerative Cummer scale rates on logs in Florida, which are not justified or required by truck competition, on the ground that reduced log rates have been established elsewhere *by other carriers* for the purpose of meeting actual existing truck competition; and that the Commission's order is not discriminatory or otherwise invalid because it increased the Cummer scale rates to the level of the reasonable interstate rates in order to remove an undue burden upon the reve-

[*] Some other important decisions of the Commission dealing with the subject of truck competition are *Cement from Hudson, N.Y.*, 186 I.C.C. 8; *Increases in Intrastate Freight Rates*, 186 I.C.C. 615; *Paper and Paper Articles*, 186 I.C.C. 536; *Refined Petroleum Products in the Southwest*, 174 I.C.C. 745, 751; *Western Trunk-Line Class Rates*, 164 I.C.C. 1, 183-185; *Container Service*, 173 I.C.C. 377, 386-388; 182 I.C.C. 653, 661; 185 I.C.C. 787, 788; *Rate Structure Investigation, Part 3, Cotton*, 181 I.C.C. 474, 476; *Dickey Clay Mfg. Co. v. A. B. & C. R. Co.*, 185 I.C.C. 639, 650. See also *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 700, 703, 724; *Coordination of Motor Transportation*, 182 I.C.C. 263; *Fifteen Per Cent Case, 1931*, 178 I.C.C. 580 et seq.

nues of the carrier. Cf. *Central R.R. Co.* v. *United States*, 257 U.S. 247, 259; *Texas & Pac. Ry. Co.* v. *U.S.*, 289 U.S. 627, 636, 649; *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 322; *United States* v. *Merchants, etc. Ass'n*, 242 U.S. 178, 188.

The Atlantic Coast Line has not reduced its log rates at any point on its system but has maintained the rates fixed by the Commission as reasonable. What appellants really seek, therefore, is restoration of the Cummer scale in Florida despite the fact that Florida would be the only place on the Coast Line system where such low rates would exist.

The sacrifice of revenue by other carriers in the South, resulting from extremely low rates voluntarily established by them, as an experiment, to meet truck competition, furnished no reason for the Commission to require the Atlantic Coast Line to make a similar but futile sacrifice of revenue on the Florida log traffic.

In respect of this subject matter the court below said in its opinion (R. 613–614):

> Pending this litigation in October 1932, the Commission reopened its order and took further evidence which showed that many voluntarily reduced rates had been established since the order by other carriers on low-grade traffic in raw materials comparable to the log rates in dispute, in the western part of the southern territory and in southwestern territory. It found, and the evi-

> dence well warranted the finding, that the reductions were a temporary experiment made in the effort to recapture traffic which had been taken away by trucks, and generally the lowered rates carried an obligation that the manufactured article should also be moved by the carrier making the rate.[13] The experiment has met with but little success. No such rates exist in the Florida territory here involved, nor is truck competition there such as to make unremunerative rates judicious as likely to improve net revenues.

The court below also found "the conclusions of fact in the Commission's report to be well supported by the evidence, *and such as we would ourselves make therefrom.*" (R. 612.)

II

The Court below correctly denied a trial *de novo*

Appellants' contention that the Court below should have granted a trial *de novo* to determine "jurisdictional facts" seems to rest upon the ground that inasmuch as the proceeding before the Commission involved intrastate rates subject to the jurisdiction of the State, the Commission was without jurisdiction to make a valid order affecting them unless in fact they cast a burden upon or

[13] This was not true of the Cummer scale rates. Those rates were not "transit" rates and their application in no way depended upon the manufactured articles moving out over the Coast Line. Cf., *Chi., etc. Ry.* v. *Pub. Util Com.*, 274 U.S. 344, 350–351.

caused an unjust discrimination against interstate commerce. Their contention is not that the Court denied them the privilege of introducing new evidence, but that the defendants in the proceeding, the United States, the Interstate Commerce Commission, and the Atlantic Coast Line Railroad Company, should have been required to introduce evidence before the three-judge court which would show, independently of the evidence introduced before the Commission and independently of the Commission's findings, that the State rates did in fact cast a burden upon or cause an unjust discrimination against interstate commerce, failing which the Court would lack jurisdiction to sustain the Commission's order and would be compelled to set it aside.

Lack of merit in the contention finds demonstration in the numerous section 13 cases recently decided by this Court in which the Commission orders were sustained, though in none of them was there a trial *de novo* in the specially-constituted District Court. Going back to the very first case relating to discrimination against interstate commerce caused by unreasonably low State rates, *The Shreveport Case*, 234 U.S. 342, there has been no case in which this Court has held or suggested that a trial anew in the District Court was necessary or proper. Previous decisions of this Court seem indisputably to establish the following: Under section 13 the Commission is authorized to make such

an order as that here involved. Under the Urgent Deficiencies Act the specially-constituted District Court has jurisdiction to review the order. In such review the Court does not proceed *de novo* to determine the facts, but considers only questions of law. The Commission is the fact-finding body. The Court does not review the Commission's findings of fact except to determine whether they are supported by substantial evidence. Since, in a section 13 case, the ultimate fact determined by the Commission is whether the state rates cause unjust discrimination against interstate commerce, it is apparent that if the three-judge Court were required to determine the fact for itself, in a trial *de novo*, it would be compelled to retry the whole case, to exercise administrative judgment, to perform legislative functions, and to substitute its judgment for that of the Commission, resulting in divided authority over a subject matter delegated by Congress to the Commission and in the confusion and conflict pointed out by this Court in familiar decisions. *Procter & Gamble Co.* v. *United States*, 225 U.S. 282; *I.C.C.* v. *Ill. Cent. R.R.*, 215 U.S. 452, 470; *I.C.C.* v. *Un. Pac. R.R.*, 222 U.S. 541, 547; *Mfgrs. Ry. Co.* v. *United States*, 246 U.S. 457, 482; *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 322–324; *Tagg Bros.* v. *United States*, 280 U.S. 420, 443; *Florida* v. *United States*, 282 U.S. 194, 215.

Appellants rely upon the decision in *Crowell* v. *Benson*, 285 U.S. 22, a case under the Longshore-

men's and Harbor Workers' Compensation Act, holding that the District Court properly granted a hearing *de novo* to determine the fact whether the relation of master and servant existed as between the injured and Benson, against whom an award had been issued by the Compensation Commission. But that opinion itself points out the distinction between that case, where the subject matter of the litigation was damages for personal injury—a purely judicial and not an administrative or legislative function as is the matter of prescribing rates—and cases like the one at bar relating to matters arising between the Government and persons subject to its regulatory authority. This distinction is made at pages 50 and 51 of the opinion, in the following language:

> As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. * * *
>
> Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power *as to interstate and foreign commerce*, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.

> The *present case does not fall within the categories just described but is one of private right*, that is, of the liability of one individual to another under the law as defined. * * * (Italics supplied.)

In respect of this contention, the court below in its opinion said:

> * * * It is not doubted that the power of the Commission to make an order is a judicial question, and that the Court may examine it independently. When, however, the very fact upon the existence of which the power to act depends has been contradictorily tried before the Commission itself, its conclusion fully expressed upon its record affirming the existence of the fact is certainly sufficient to put the burden upon those who deny it. While at one time all findings of the Commission were declared by the statute to be only prima facie evidence of their correctness, that language has now been retained only with reference to money awards and to valuations of property by the Commission, and it is well established that under the enlarged and positive powers with which the Commission is now vested its findings of fact within the scope of its powers will not be reviewed by the courts if supported by evidence. (R. 617.)

Then, after citing *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, and other decisions of this Court, (R. 617–618), the Court said it "need

not decide whether in this case the Commission's finding of unjust discrimination is entitled to any less weight because it is a prerequisite of its jurisdiction as well as the meritorious basis for its exercise, because we have examined the evidence independently and are led to the same conclusion that the unjust discrimination exists." (R. 619.)

The court below did not err in denying a trial *de novo*.

CONCLUSION

It is respectfully submitted that the decree of the court below sustaining the validity of the Commission's order and denying the prayer to annul, set aside and enjoin the order should be affirmed.

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FEBRUARY 1934.

APPENDIX

The Interstate Commerce Act, as amended by Transportation Act, 1920, (41 Stat. 456) provides:

SECTION 13 (3). Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities

in the enforcement of any provision of this Act.

SECTION 13 (1). Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be,

to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

SECTION 15a. (3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

By Emergency Railroad Transportation Act, 1933, Section 205, (c. 91, 48 Stat. 211, 220, approved

June 16, 1933) section 15a of the Interstate Commerce Act was amended to read as follows:

> SEC. 15a. (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

Other pertinent provisions of Emergency Railroad Transportation Act, 1933, are as follows:

> SEC. 2. In order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation, there is hereby created the office of Federal Coordinator of Transportation, who shall be appointed by the President, by and with the advice and consent of the Senate, or be designated by the President from the membership of the Commission.
>
> SEC. 10. (a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in

effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies; and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however*, That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

(b) The Coordinator shall issue no order which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State commission until he has advised the State commission of said State, or the Governor of said State, if there be no such commission, that such order is in contemplation, and shall afford the State commission or Governor so notified reasonable opportunity to present views and information bearing upon such contemplated order, nor unless such order is necessary, in his opinion, to prevent or remove an obstruction to or a burden upon interstate commerce.

SEC. 206. (a) All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable

and payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.